**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LETICIA ESQUIVEL** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 157,009 |
| **MONFORT, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CITY INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals from an Award entered by Administrative Law Judge Thomas F. Richardson dated December 22, 1994. The Appeals Board heard oral argument on March 14, 1995.

### APPEARANCES

The claimant appeared by her attorney, Harold K. Greenleaf of Liberal, Kansas. The respondent and insurance carrier appeared by their attorney, Bradley C. Ralph of Dodge City, Kansas.

### STIPULATIONS AND RECORD

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

The issues to be addressed on appeal are:

(1) Whether the Administrative Law Judge erred by considering certain medical records not provided claimant's counsel within fifteen (15) days in accordance with K.S.A. 1990 Supp. 44-515.

(2) Whether the Administrative Law Judge erred in considering the deposition of Dr. Ellis because said deposition was taken by telephone without agreement by opposing counsel or order approving it by telephone.

(3) What is the nature and extent of claimant's disability?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

(1) K.S.A. 1990 Supp. 44-515 does not preclude the Administrative Law Judge from considering records of treatment provided the claimant even where those records were not provided claimant's counsel within fifteen (15) days of the treatment. The Appeals Board concludes that K.S.A. 1990 Supp. 44-515 should be narrowly construed to apply only to reports done for evaluation or rating purposes, not the ordinary records of medical treatment. The Administrative Law Judge did not, therefore, err by considering the records of treatment.

(2) The Administrative Law Judge did not err by considering the deposition of Dr. Ellis. Claimant's counsel cites K.S.A. 60-230 in support of the argument that the Administrative Law Judge should refuse to consider a deposition taken by telephone when permission for the taking by telephone was not either granted by the Administrative Law Judge or agreed to by opposing counsel. The rules of civil procedure found in Chapter 60 are not, however, binding in the workers compensation proceedings. The Administrative Law Judge is not bound by technical rules of procedure. Crow v. City of Wichita, 222 Kan. 322, 566 P.2d 1 (1977). While the Appeals Board would encourage and expect counsel to cooperate and communicate regarding how depositions are to be taken, we find no error in the decision made in this case to consider the deposition of Dr. Ellis.

(3) The Appeals Board finds claimant is entitled to benefits based upon ten percent (10%) permanent partial general disability.

Claimant contends that the Administrative Law Judge should have awarded benefits for work disability, at least for the period after termination of claimant's employment for respondent. Claimant contends she was discharged from her employment because she refused to do work which she was unable to do and which would have been outside her restrictions. Claimant testified that in January of 1994 respondent moved her to a position as a loose meat auditor. According to claimant, she could not perform the duties of a loose meat auditor within the restrictions recommended by treating physicians. Respondent, on the other hand, points out that after the injury claimant returned and continued to work for respondent at a comparable wage for a period of four (4) years. Respondent contends that claimant could have continued to work for respondent at a comparable wage and should, therefore, be limited to an award based upon functional impairment only.

Two physicians testified by deposition and records of several others were introduced. Dr. Fluter testified that in his examination of claimant he found the measurements relating to range of motion could not be considered reliable. Taking into consideration the inconsistencies in the range of motion, he rated claimant's functional impairment at seven and one-half percent (7.5%) of the body as a whole. He testified it was his impression claimant has chronic pain syndrome with evidence of symptom magnification. Dr. Fluter testified that he had referred claimant to Dr. Moeller to determine whether claimant was malingering.

Dr. Ellis, on the other hand, testified he diagnosed muscle tendon strain, right lumbosacral plexus impairment, probable L5 and S1 nerve root impingement, myofascial pain syndrome, fibromyalgia of the lumbar, thoracic, and cervical paraspinous muscles. He also diagnosed brachial plexus and occipital nerve impingement causing tingling in the arms and causing headaches. He rated her impairment at twenty-three percent (23%) of the body as a whole based upon AMA Guides.

Records of Dr. Reiff Brown and Dr. Rawcliffe were introduced. Both had examined and treated claimant. Dr. Brown rated her impairment as ten percent (10%) of the body as a whole. He recommended that she avoid lifting more than sixty to seventy pounds (60-70 lbs.) on a single basis and thirty to forty pounds (30-40 lbs.) occasionally. Dr. Rawcliffe rated her impairment as five percent (5%) of the body as a whole and recommended that she restrict her work to the medium category with occasional lifting up to fifty pounds (50 lbs.), frequent lifting up to twenty-five pounds (25 lbs.), and also recommended that she avoid repetitive bending or stooping. Functional capacity evaluations were done showing a diagnosis of total body pain and demonstrating ability to work only in the light category. As Dr. Rawcliffe noted, virtually all physicians who examined her expressed the opinion she is either having psychological problems or is consciously malingering.

After reviewing the entire record, the Appeals Board agrees with the conclusion by the Administrative Law Judge that the rating by Dr. Reiff Brown most accurately reflects the functional impairment. Based upon the findings by the various physicians, it appears the rating by Dr. Ellis substantially exaggerates claimant's impairment. The Appeals Board also concludes that the respondent is entitled to the benefit of the presumption that

claimant suffered no work disability. See K.S.A. 1990 Supp. 44-510e. The evidence in this case does not overcome that presumption. Respondent produced credible evidence through its health service manager, Vicki Katz, that respondent had considered claimant's restrictions when placing her in the position as a loose meat auditor, the last job she worked for respondent. The restrictions had been reviewed and compared to the job duties. The health service manager, the production superintendent, and the personnel officer all considered the job to be within the recommended restrictions. Ms. Katz had testified that she applied the most restrictive set of restrictions when determining what job duties claimant could perform. Probably even more convincing, is the consistent suggestion in the medical records of nearly every physician who examined claimant that she was exaggerating her symptoms and complaints. For these reasons, the Appeals Board concludes claimant could have returned to and continued doing work at a comparable wage job. The presumption is not overcome and claimant should be limited to an award based upon functional impairment of ten percent (10%).

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that an award of compensation is entered in accordance with the above findings in favor of the claimant, Leticia Esquivel, and against the respondent, Monfort, Inc., and its insurance carrier, City Insurance Company, for an accidental injury occurring on September 6, 1990.

The claimant is entitled to 177.71 weeks of permanent partial disability at the rate of $19.93 per week for the sum of $3,541.76 and 237.29 weeks at $21.84 per week or $5,182.41 for a 10% permanent partial general disability making a total award of $8,724.17. As of 4/14/95 there would be due and owing to the claimant 177.71 weeks of permanent partial compensation at $19.93 per week in the sum of $3,541.76 and 62.58 weeks of permanent partial compensation at $21.84 per week in the sum of $1,366.75 for a total due and owing of $4,908.51 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $3,815.66 shall be paid at $21.84 per week for 174.71 weeks or until further order of the Director.

Claimant is awarded an amount not to exceed $350.00 as unauthorized medical expenses upon proof thereof.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid direct as follows:

Underwood & Shane
Transcript of proceedings $198.50

Alexander Reporting
Deposition of Dr. Fluter $215.64

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| K. Pfannenstiel Reporting & Assoc.<br>Deposition of Joe Garcia | Unknown |
| K. Pfannenstiel Reporting & Assoc.<br>Deposition of Vicki Katz | Unknown |
| K. Pfannenstiel Reporting & Assoc.<br>Deposition of Ernesto Rodriguez | Unknown |
| K. Pfannenstiel Reporting & Assoc.<br>Deposition of Leticia Esquivel | Unknown |
| Court Reporting Services<br>Deposition of James Molski | Unknown |

The deposition costs to Maynard Peterson & Associates for the deposition of Dr. Ellis in an amount unknown is assessed to the claimant.

**IT IS SO ORDERED.**

Dated this ____ day of April, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Harold K. Greenleaf, Liberal, Ks
Bradley C. Ralph, Dodge City, Ks
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director